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In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED E. AZHOCAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 581 F.2d 735.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1978. A petition for rehearing was denied on September 6, 1978. A petition for a writ of certiorari was filed on September 27, 1978. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence seized in a warrantless search of the car driven by petitioner's cousin should have been suppressed.

2. Whether the trial judge erred in denying petitioner's motion that he recuse himself.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to import, possess and distribute heroin and cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to two consecutive 10-year terms of imprisonment followed by a lifetime special parole term. After a bench trial based on stipulated facts derived from the narcotics conspiracy trial, petitioner was found guilty of receipt of a firearm by a convicted felon in violation of 18 U.S.C. 922(h) and 924 and sentenced to five years' imprisonment under 18 U.S.C. 4205(b)(2), the sentence to run con-

[1] Count I named Olivia Azhocar-Angulo, Norma Williamson, Thomas Reyes, Geronimo Gutierrez-Sanchez, and Refugio Salazar-Garcia as petitioner's co-conspirators. Olivia Azhocar's severance motion was granted by the trial court. Gutierrez-Sanchez was acquitted by the trial court, and Reyes and Williamson were acquitted by the jury. Salazar-Garcia has not yet been tried.

currently with that imposed for the narcotics convictions.[2]

The government's evidence showed that DEA agents began surveillance in January 1976 of a group of narcotics dealers in Mexico and the border areas of California. Petitioner, who had previously been convicted of narcotics offenses in state court, was one of the suspected dealers who was placed under surveillance (Tr. 343-346). During the federal investigation, petitioner was seen with Gutierrez-Sanchez, a known narcotics trafficker who maintained residences both in Mexico and California (Tr. 344, 346-349, 356-359, 398, 430). Petitioner was also seen with Salazar-Garcia and Lizzaraga-Ozuna, both of whom were being sought on federal drug charges (Tr. 356-359). During this same period, Salazar-Garcia introduced a DEA informant to Gutierrez-Sanchez so that they could discuss the possibility of smuggling narcotics into the United States (Tr. 355).

In the course of this investigation, government agents reviewed the billing records for petitioner's home telephone, which revealed calls to Gutierrez-Sanchez's apartment in Mexico (where petitioner had been seen with Gutierrez-Sanchez) to Gutierrez-Sanchez's residence in California, and to a hotel in Tiajuana where Gutierrez-Sanchez had stayed (Tr. 358). Government agents also learned that Mexican authorities had charged Gutierrez-Sanchez with evad-

[2] After this conviction, four additional counts that charged similar offenses were dismissed at the government's request.

ing the taxes on millions of pesos earned from the sale of narcotics (Tr. 364-365).

On July 23, 1976, DEA agents in Mexico observed Patricia Azhocar, petitioner's cousin by marriage, meet with Salazar-Garcia (a known associate of Gutierrez-Sanchez) in a black-over-maroon Cadillac (Tr. 373, 449, 497). On the same day petitioner was seen in the parking lot of Patricia's apartment building (Tr. 366, 373-374).

On July 27, at about noon, agents began surveillance of petitioner's residence in Imperial Beach, California, about four miles from the Mexican border (Tr. 346, 360-362, 364, 389). During the next four hours, the agents observed a number of individuals arrive in automobiles, enter the residence, and leave (Tr. 360). At approximately 4:25 p.m., Patricia arrived at petitioner's house driving the same Cadillac she had been driving when she met with Salazar-Garcia in Mexico (Tr. 360, 401). Patricia entered the house for a short time, then returned to the car, removed a large package from the trunk, and reentered the house (Tr. 360-361, 401-402). About 20 minutes later she left the house carrying a box and a bag, placed those items in the trunk, and drove away (Tr. 360, 402-403).[3] The law enforcement officers followed.

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[3] While Patricia was in petitioner's house, one of the agents left to seek the assistance of an Assistant United States Attorney in obtaining a warrant to search the Cadillac (Tr. 366, 386, 403-404).

After she had driven a short distance, Patricia began to drive erratically in an apparent attempt to evade the surveilling officers (Tr. 375-376, 445, 453-454). During this time, Agent Williams spoke to the Chula Vista police concerning the circumstances of their investigation and requested that the local police stop Patricia on the ruse that they believed that the car had been stolen and that it contained firearms (Tr. 367, 454). After about 25 minutes of driving in circles, Patricia parked the car in a store parking lot. Several Chula Vista policemen pulled up behind Patricia, asked her to step out of the car, and conducted a search of the car that uncovered a box and bag containing three kilograms of cocaine, cutting agents, and a scale (Tr. 368, 456, 478-479).

Patricia cooperated with government agents, giving consent for a search of another car and her apartment (Tr. 494-496, 508). The agents found three pounds each of heroin and cocaine in the second car (Tr. 1012-1013, 1017). A later warrant-authorized search of petitioner's house yielded quantities of heroin, marijuana, and cocaine, $4,900 in cash, and numerous firearms (Tr. 915-920, 946-948, 955-956, 993-996). Approximately $100,000 in cash was discovered hidden behind a panel in the trunk of petitioner's car, which was parked in the adjoining garage (Tr. 169, 961-962, 1003).

Prior to trial, petitioner moved to suppress the evidence seized from the Cadillac driven by Patricia Azhocar. Although Patricia was the registered owner of the car, petitioner testified that he was the true

owner and that he had permitted Patricia to use it to carry and store narcotics (Tr. 150-151, 154). He stated that he had given Patricia the money to purchase the car and pay for its registration, and that he told her to register the car in her own name (Tr. 150-152, 154, 158). The district court ruled that petitioner had established standing to challenge the search (Tr. 162). The court concluded that there was probable cause for the search of the vehicle, and that the "fastbreaking" circumstances justified proceeding without a warrant, since the car was parked in a public place and there was a danger that conspirators might try to destroy any evidence in the car (Tr. 724-725). Accordingly, petitioner's motion to suppress the evidence discovered in the car was denied.

Patricia Azhocar testified as a prosecution witness at trial (Tr. 1090-1221), and the evidence seized from the Cadillac, as well as the drugs, money, and firearms seized at petitioner's home, were introduced into evidence.

ARGUMENT

1. a. Petitioner contends (Pet. 14-30) that the search of the Cadillac was unsupported by probable cause and that the evidence discovered as a result of the search should have been suppressed. This contention is without merit. Since this case involves only the application of settled principles to the facts of this case, it does not present an issue warranting review by this Court. Moreover, as the court of appeals correctly concluded (Pet. App. 8), there was "abundant probable cause to believe that a delivery of narcotics was being made" by Patricia Azhocar and that the narcotics were in her automobile.[4]

A six-month investigation encompassing surveillance in both the United States and Mexico had revealed that petitioner, himself a convicted narcotics dealer, was associating with other known traffickers in Mexico. Telephone toll records provided additional evidence of petitioner's communications with other members of the conspiracy. Informants provided information that Gutierrez-Sanchez was arranging the movement of large quantities of narcotics from Mexico to the United States, and investigators suspected that petitioner was involved. A few days after she was seen talking with Salazar-Garcia in Mexico, petitioner's cousin, Patricia Azhocar, visited petitioner's house. She was driving the same automobile in which she had met Salazar-Garcia. Based upon the information gained in their investigation, when the agents observed Patricia carry a package into petitioner's house and return shortly thereafter to the car with two other packages, they drew the inference that she was assisting petitioner in the importation and distribution of narcotics and that the packages

[4] Petitioner also attacks the search (Pet. 22-23), on the ground that one of the agents requested that local police stop Patricia's car on the pretense that they believed the car was stolen and that it contained guns. However, since the federal agents had probable cause for the search, the subjective state of mind of the individual officers is not relevant. See *Scott* v. *United States*, 436 U.S. 128, 138 (1978).

in her car contained narcotics. Patricia's evasive driving maneuvers when she noticed that she was being followed provided strong corroboration for the agents' conclusions. As the district court observed (Tr. 724), "her desperate efforts to elude the agents and her activity in so doing changed what may well have been an innocent or strong suspicion into probable cause." See *United States* v. *Rodriguez-Alvarado*, 510 F.2d 1063, 1064 (9th Cir. 1975).

Petitioner argues (Pet. 19-20) that the activities outlined above were innocent in themselves and that the agents' actions were premised "on mere suspicion and hunch" (Pet. 24). But even though individual actions, viewed in isolation, may appear to be innocent, the probable cause determination turns on "the totality of the circumstances and the inferences that flow therefrom." *United States* v. *Clark*, 559 F.2d 420, 424 (5th Cir. 1977). "[T]he officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience * * *." *United States* v. *Ortiz*, 422 U.S. 891, 897 (1975).

b. Alternatively, assuming that there was probable cause, petitioner urges (Pet. 27-28) that there was no justification for conducting the search without first obtaining a warrant. He implicitly recognizes that the agents could not leave the automobile unsecured in the public parking lot because of the danger that Patricia would drive off and elude them, or that the co-conspirators might empty the car of evidence. See *Carroll* v. *United States*, 267 U.S. 132,

153 (1925). But he argues that the agents could have guarded Patricia and the car until a warrant was secured, and that "[w]ith several government agents and more than three local police vehicles surrounding the Patricia Azhocar vehicle, the likelihood of its removal was extremely remote" (Pet. 27).

It is well settled that when an automobile is stopped in a public street or parking area on the basis of probable cause, the police may search it immediately rather than detaining it while they seek a search warrant. *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970). See *United States* v. *Chadwick*, 433 U.S. 1, 14 n.8 (1977).[5]

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[5] Moreover, although the court of appeals did not consider this point, even if the search of the car had been improper, suppression would not have been required because petitioner had no constitutionally protected privacy interest in the car.

The district court based its conclusion that petitioner had standing to challenge the legality of the search on his testimony that he had provided Patricia with the money to purchase the car, and that he was the true owner of the vehicle although it had been registered and licensed in Patricia's name. As this Court explained in *Rakas* v. *Illinois*, No. 77-5781 (December 5, 1978), the only persons entitled to challenge the legality of a search are those whose constitutionally protected expectations of privacy have been violated. Petitioner's testimony that he had provided the money to purchase the car so that Patricia could use it to store and transport narcotics for him did not establish that he had a legitimate constitutionally protected expectation of privacy in the vehicle. Petitioner admitted that he had only driven the car on two or three occasions and that Patricia generally kept the car at her apartment and had its use (Tr. 159). Since petitioner allowed Patricia to purchase the car, register it in her own name, and have it under her control from day to day, the fact that he had provided the purchase price so that the car

2. Petitioner also contends (Pet. 31-43) that the trial judge erred in refusing to recuse himself. During a pretrial hearing on a motion to reduce Gutierrez-Sanchez's bail, Gutierrez-Sanchez argued that the government's case against him was so weak that he had little incentive to flee (Tr. 79-81). In support of that argument, he offered an affidavit in which petitioner averred that if he were tried first, he would then testify at Gutierrez-Sanchez's trial and exculpate him (Tr. 84-85). The trial judge denied the motion, stating that he had "reviewed this case and all of the pleadings in the case and I have got to say to be truthful with you, that I think [Gutierrez-Sanchez is] going to run" (Tr. 83). The trial judge also stated that although he had not seen petitioner's affidavit, "frankly, to be truthful with you, I wouldn't care what [petitioner] said in an affidavit. I wouldn't believe him if he said on a stack of bibles" (Tr. 87). The court then cautioned Gutierrez-Sanchez's counsel about resting his defense on petitioner's testimony, stating that as a witness petitioner "is going to hurt you more than he's going to help you" (Tr. 88).

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would be available to carry narcotics did not allow him to claim a legitimate expectation of privacy. See *United States* v. *McConnell*, 500 F.2d 347 (5th Cir. 1974) (defendant who permitted and paid for rental of car for co-defendant not entitled to challenge search); cf. *United States* v. *Burke*, 506 F.2d 1165 (9th Cir. 1974), cert. denied, 421 U.S. 915 (1975) (defendant who claimed he had paid for van that was registered in his brother's name held entitled to challenge search because his frequent use gave him a legitimate expectation of privacy).

Shortly thereafter, petitioner filed a motion pursuant to 28 U.S.C. 144 [6] for recusal on the grounds that the trial judge's comments demonstrated bias against petitioner.[7] After a hearing the trial judge denied the motion, ruling that "I know whether or not I'm prejudiced against somebody or I'm not, and I think I'm the only one who does know that, and I'm certainly not prejudiced against anybody" (Tr. 109). He also emphasized that petitioner was being tried by a jury, and that his own role in the trial of the case would be a limited one, since it was his policy not to comment on the evidence, to question witnesses, or otherwise to take an active role at trial (Tr. 109-110).

The court of appeals concluded (Pet. App. 15) that the trial judge's remarks at the bail hearing had been "ill-advised, and are not condoned," but it affirmed the denial of the recusal motion on the grounds that petitioner had not established any extrajudicial source of prejudice, nor shown that the judge

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[6] 28 U.S.C. 144 provides in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

[7] Petitioner's affidavit also alleged on information and belief that the judge had stated he intended to impose the maximum sentence permitted if petitioner was convicted. The transcript demonstrated that the judge made no such remarks (see Pet. App. 21-22), and petitioner does not now rely on that allegation.

would be affected by his initial assessment of petitioner's credibility and "close his eyes and ears to other evidence" (Pet. App. 19-21).

Petitioner apparently concedes that disqualifying prejudice must stem from an extrajudicial source, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger* v. *United States*, 255 U.S. 22, 23 (1921), but he urges (Pet. 33) that "the conclusion by the Court of Appeals that the trial court's bias was not from an extrajudicial source is wholly without support in the record below," because the only materials filed at that time were "the accusatory pleadings of the government."

The record provides no support for this contention. At the hearing on Gutierrez-Sanchez's bail, the district judge stated that he had reviewed everything filed so far in the case (Tr. 83, 87). He indicated that he had carefully gone over the records of Gutierrez-Sanchez's three prior bail review proceedings before the magistrate, another district judge, and the court of appeals (Tr. 83-84, 87; R. 1, 14, 16).[8] Additionally, on September 22, 1976, the government had filed two factual affidavits describing the evidence against petitioner and Gutierrez (R. 128-131). The court of appeals correctly concluded that petitioner had provided no reason to believe that the trial judge's opinion of petitioner's credibility was not based upon the record in the case before him, and accordingly that he was not required to recuse himself.

[8] "R." refers to the record filed in the court of appeals.

Petitioner also argues (Pet. 34-40) that the district court erred in failing to consider his recusal motion in light of 28 U.S.C. 455, which, he contends (Pet. 36), is "self-activating" and requires less substantiation than a motion under Section 144. Petitioner based his motion solely on Section 144, and he never urged either court below to consider his claim under Section 455. Since this claim was never advanced in the courts below, it is not a proper basis for review by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, there is no reason why the result would be any different under Section 455 than under Section 144, since Section 455 did not eliminate the extrajudicial source requirement for disqualification based on bias or prejudice. See *King* v. *United States*, 576 F.2d 432, 437 (2d Cir. 1978); *United States* v. *Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977). Accordingly, petitioner's motion to disqualify Judge Thompson was properly denied under any statutory test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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